OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 92-8 June 30, 1992

TO: All Associate General Counsels, Division Heads, Branch Chiefs in the Divisions of Enforcement Litigation and Advice, Regional Directors, Resident Officers, and Officers-in-Charge

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Executive Order 12778 of October 23, 1991 Civil Justice Reform

On October 23, 1991 President George Bush issued an Executive Order setting forth certain measures to be implemented by executive agencies when they conduct or otherwise participate in litigation in federal courts. The purpose of these measures is to promote the just and efficient resolution of civil claims involving the Government, as well as to serve as a model for private litigants. The following guidance implements Section 1 of the Executive Order and should be followed by all attorneys in the Washington Office of the General Counsel and Field Offices in the conduct of litigation in federal courts involving the Agency. It is organized to follow the format of the Executive Order, which is attached.

In issuing the Executive Order, President Bush noted that it would hold Government counsel to higher standards than private practitioners. His purpose, however, is to give Government attorneys the opportunity to lead the country by example toward civil justice reform.

I know that the attorneys at the National Labor Relations Board have always adhered to the highest standards of the legal profession. Many of the standards set forth in these guidelines are already part of your daily practice as counsel in NLRB cases. The additional guidelines set forth herein will ensure that this Agency effectively delivers justice without undue delay or wasteful litigation.

Jerry M. Hunter
General Counsel

Attachments

cc: NLRBU

Guidelines to Promote Just and Efficient NLRB Civil Litigation

(a) Prefiling Notice of a Complaint.

Agency counsel should not file a petition for enforcement or other complaint initiating litigation without first making a reasonable effort to notify all parties about the nature of the dispute and to attempt to achieve compliance or settlement. (See also CHM Section 10506.1, requiring the Regional Director to notify the Respondent that a recommendation for enforcement has been made.)

Prefiling notice is not required in the following circumstances:

(1) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding;
(2) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation or destruction;
(3) when the defendant is subject to flight; and,
(4) when, as determined by the appropriate Branch Chief or Regional Director, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief.

(b) Settlement Conferences.

Throughout the litigation, counsel should be aware of settlement possibilities and make reasonable efforts to settle the litigation. CHM Sections 10230 and 10310.4 discuss the nature of settlement efforts which should be undertaken in Section 10(l) and 10(j) cases.

Settlement efforts may include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure. However, in assessing whether to file such a motion, counsel should be mindful that Section 10(j), 10(l) and 10(e) proceedings should be expedited.

Counsel should clearly state the terms upon which he or she is prepared to recommend that the Agency conclude the litigation without further expenditure of effort.

(c) Alternative Methods of Resolving the Dispute in Litigation.

If alternative dispute resolution procedures are suggested by a party to Agency counsel, the party should be advised that the General Counsel will not agree to the use of binding arbitration or any other equivalent alternative dispute resolution technique. The use of informal procedures may be considered, but any settlement reached must be consistent with outstanding guidelines in order to be approved. The use of alternative dispute resolution methods must be approved by the appropriate Branch Chief or Regional Director.

(d) Discovery.

Agency counsel should keep discovery requests to a minimum, consistent with the litigation needs of the case and the agency's statutory mission. To this end, all interrogatories, requests for production of documents, and notices of deposition must be reviewed and approved by a supervisory attorney before mailing or service.

In any case where discovery is appropriate,[1] the initial discovery request should include a request for admissions as to each relevant fact alleged in the agency's petition, complaint or answer. If the opposing party admits relevant facts, or fails to answer the request for admissions, appropriate steps should be taken to limit the issues for trial--for example, by seeking full or partial summary judgment or in limine relief.

In those cases where discovery will be sought, Agency counsel shall, to the extent practicable, make reasonable efforts to agree with opposing counsel mutually to exchange "core information" at the outset of discovery. Core information is defined in the Executive Order as the "names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of

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1 Generally, a district court's evidentiary inquiry is limited in injunction proceedings under Section 10(j) and 10(l) to whether there is reasonable cause to believe a violation has occurred. Further, such proceedings often present circumstances requiring expeditious relief. Accordingly, the Agency generally does not initiate discovery in such cases and would seek to limit the scope and time for response for any discovery requests initiated by opposing counsel.

documents most relevant to the case."[2] Counsel should agree to such disclosure only if the other parties to the proceeding agree to exchange the same information and the court adopts the agreement as a stipulated order. The exchange process should not be used while a dispositive motion is pending.

When a case involves threats of retaliation against individual employees, and "core information" to be exchanged would include the identity of such individuals, it may be appropriate to include in the stipulation governing the exchange a protective order under F.R.C.P. Rule 26(c) to limit the dissemination of such information and to place the Respondent under an order (enforceable on contempt) against any retaliation.

When a party fails to comply with a discovery request made under Rules 26-36 of the Federal Rules of Civil Procedure, the party requesting discovery may apply for an order compelling discovery under Rule 37(a). Agency counsel should attempt to resolve discovery disputes with opposing counsel before asking the court to intervene. Counsel should first make reasonable efforts to resolve discovery disputes informally. Should those efforts fail, a motion to compel under Rule 37(a) should be reviewed and approved by a supervisory attorney prior to filing. Subject to applicable local rules and standing orders, any motion papers should include a recitation of the Board's unsuccessful efforts to resolve the dispute informally. (Motions for sanctions under Rule 37(d) are covered under Section (f) of these Guidelines.)

(e) Expert Witnesses.

Attorneys should only proffer reliable expert testimony in judicial proceedings. Agency counsel should only use experts who have knowledge, background, research or other expertise in the particular field of the subject of their testimony. Counsel should offer to engage in mutual disclosure of information pertaining to experts who counsel expects to call at trial. Counsel should make every reasonable effort to present expert testimony from experts who base their conclusion on explanatory theories that are widely accepted, i.e., are propounded by at least a substantial minority of experts in the relevant field. The amount of

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2 A standing committee of the Judicial Conference of the United States has proposed changes to the F.R.C.P. which would codify this proposal--that is, require an exchange of core information at the outset of discovery. If approved, these changes would take effect in late 1993.

compensation paid to the expert shall not be linked to a successful outcome in the litigation.

(f) Sanctions.

Agency counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate. Provisions most commonly used to impose sanctions are Rules 11, 26 and 37 of the F.R.C.P., and Rule 38 of the Federal Rules of Appellate Procedure.[3] Rule 11 obligates attorneys to conduct a reasonable inquiry to determine that a pleading, motion or other paper filed with the court is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. It forbids attorneys to file a pleading or other paper for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation. Bad faith is not a prerequisite to the imposition of sanctions under Rule 11.[4] Rule 26(g) imposes a parallel duty with respect to discovery requests.[5] Both Rules authorize district courts to impose sanctions, including the opposing party's costs and a reasonable attorney's fee, on

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3 In addition, 28 U.S.C. 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." See, e.g., NLRB v. Laborers Fund Corp., 124 LRRM 2078, 2083, 2097-2099 (9th Cir. 1986).

Other provisions of the F.R.C.P. containing sanction language are Rule 16(f) (pretrial conferences); 30(g) (oral depositions); and 56(g) (bad faith affidavits in support of summary judgment motions). In addition, Rule 45(e) provides for contempt sanctions in the event of noncompliance with a subpoena.

Courts also possess inherent authority to impose sanctions. Chambers v. NASCO, ___ U.S. ___, 111 S. Ct. 2123, 2131-2136 (1991).

4 See, e.g., Notes of Advisory Committee on Rules, 1983 Amendment; Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 931-932 (7th Cir. 1989).

5 See, e.g., Notes of Advisory Committee on Rules, 1983 Amendment.

lawyers, and the parties they represent, for violations of the Rule. Rule 37, dealing with failure to make or cooperate with discovery, authorizes various forms of sanctions in connection with a party's failure to fulfill its obligations in conducting and responding to discovery. Rule 38 of the F.R.A.P. authorizes the circuit courts to award damages and single or double costs on an appellant which files a frivolous appeal.[6]

The Board will seek sanctions against parties that interpose frivolous claims as a means to delay or frustrate the Board's processes. When such circumstances arise, Agency counsel should attempt to resolve the dispute by means short of a motion for sanctions. If such efforts are unsuccessful, counsel should take steps to seek sanctions.

All motions for sanctions must be reviewed by the Agency's sanctions officer or his or her designee before they are filed. The sanctions officer for the National Labor Relations Board is the Deputy General Counsel. The Associate General Counsel for the Division of Enforcement Litigation is designated to review and approve sanctions motions in connection with matters handled by the Appellate Court Branch, the Contempt Litigation Branch, the Special Litigation Branch and the Supreme Court Branch. The Associate General Counsel for the Division of Advice is designated to review and approve sanctions motions in connection with injunction litigation under Sections 10(j) and 10(l) of the Act, including those cases in which the litigation is being handled by a Regional Office. No attorney in a Washington Office of the General Counsel or a Field Office shall file a motion for sanctions without submitting it for review to the appropriate designee of the sanctions officer.[7]

The sanctions officer or designee shall also review motions for sanctions filed against Agency counsel or the Agency. Accordingly, whenever opposing counsel files a motion seeking sanctions against the Agency or one of its attorneys, Agency counsel shall promptly submit to the appropriate designee of the sanctions officer copies of such motions, together with a recommendation as to what response the Agency should make.

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6 See, e.g., NLRB v. Catalina Yachts, 679 F. 2d 180, 182 (9th Cir. 1982); Kaynard v. MMIC, 734 F.2d 950, 954 (2d Cir. 1984).

7 The requirement for clearance does not apply to a motion to compel discovery under Rule 37(a).

(g) Improved Use of Litigation Resources.

Agency counsel and their supervisors shall make reasonable efforts to expedite civil litigation in cases under their supervision and control. This includes, but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable; and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried.

Attachment: Executive Order 12778 of October 23, 1991
Civil Justice Reform

Federal Register
Vol. 56, No. 207
Friday, October 25, 1991

Presidential Documents

Title 3—

The President

Executive Order 12778 of October 23, 1991

Civil Justice Reform

WHEREAS, the tremendous growth in civil litigation has burdened the American court system and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels;

WHEREAS, several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation;

WHEREAS, the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution, limitations on unnecessary discovery, judicious use of expert testimony, prudent use of sanctions, improved use of litigation resources, and, where appropriate, modified fee arrangements;

WHEREAS, the United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts;

WHEREAS, improving the quality of legislation and regulation to eliminate ambiguities in drafting would reduce uncertainty and unnecessary litigation; and,

WHEREAS, improving the quality of administrative adjudications would reduce the time and resources expended during the administrative process.

NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3, United States Code, and in order to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, hereby order as follows:

Section 1. *Guidelines to Promote Just and Efficient Government Civil Litigation.* To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) *Pre-filing Notice of a Complaint.* No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) *Settlement Conferences.* As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the

Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) *Alternative Methods of Resolving the Dispute in Litigation.* Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding. At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims. Where such benefits may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the private parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph shall be interpreted in a manner consistent with section 4(b) of the Administrative Dispute Resolution Act, Public Law 101-552, 104 Stat. 2736 (1990). Practice under Tax Court Rule 124 shall be exempt from this provision.

(d) *Discovery.* To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) *Disclosure of Core Information.* In those cases where discovery will be sought, litigation counsel shall, to the extent practicable, make reasonable efforts to agree with other parties mutually to exchange a disclosure statement containing core information relevant to the dispute and to stipulate to an order memorializing such agreement. For purposes of this subsection, "core information" means the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case. This guideline to disclose core information shall not apply in cases while a dispositive motion is pending.

(2) *Review of Proposed Document Requests.* Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(3) *Discovery Motions.* Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) *Expert Witnesses.* Litigation counsel shall make every reasonable effort to present only reliable expert testimony before a court.

(1) *Widely accepted theories.* Litigation counsel shall refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely accepted. For purposes of this subsection, a theory is widely accepted if it is propounded by at least a substantial minority of the experts in the relevant field.

(2) *Expertise in the field.* Litigation counsel shall present expert testimony only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.

(3) *Expert disclosure.* Litigation counsel shall offer to engage in mutual disclosure of expert witness information for those experts that a party expects to call as expert witnesses at trial, provided, and to the extent, that the other parties agree to make comparable disclosures of any expert witnesses they expect to call at trial.

(4) *Ban on contingency fees.* The amount of compensation paid to an expert witness shall not be linked to a successful outcome in the litigation.

(f) *Sanctions.* Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(g) *Improved Use of Litigation Resources.* Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable; and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried.

(h) *Fees and Expenses.* To the extent permissible by law, in civil litigation involving disputes over Federal contracts pursuant to 41 U.S.C. 601 *et seq.*, or in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations. The Attorney General shall review the legal authority for entering into such agreements.

Sec. 2. *Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.*

(a) *General Duty to Review Legislation and Regulations.* Within [illegible] budgetary constraints and existing executive branch coordination [illegible] and procedures established in OMB Circular A-19 (legislation) [illegible] Order No. 12291 (regulation), each agency that is promulgating [illegible] tions, reviewing existing regulations, developing legislative [illegible]

ing regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity.

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation.

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) *Specific Issues for Review.* In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation—

(A) Specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) Specifies in clear language the preemptive effect, if any, to be given to the law;

(C) Specifies in clear language the effect on existing Federal law, if any, including all provisions repealed or modified;

(D) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(E) Specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions, subject to constitutional requirements;

(F) Specifies whether the provisions of the law are constitutionally severable, if appropriate;

(G) Specifies in clear language the retroactive effect, if any, to be given to the law;

(H) Specifies in clear language the applicable burdens of proof;

(I) Specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for any authorized award of attorney's fees, if any;

(J) Specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) Sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) Defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) Specifies whether the legislation applies to the Federal Government or its agencies;

(O) Specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands; and,

(P) Addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after

consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation—

(A) Specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) Specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed or modified;

(C) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) Specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) Defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items;

(G) Addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) *Certification of Compliance for Agency Legislation or Regulations.* When transmitting such draft legislation or regulation to the Office of Management and Budget ("OMB"), the agency must certify that (i) it has reviewed such draft legislation or regulation in light of this section, and (ii) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards. Recommendations and cost-benefit analyses under subsection (d) of this section shall be included in the agency certification required by this subsection.

(d) *One-Way Fee Provisions.* Each agency shall review, and shall perform a cost-benefit analysis on, all provisions of any legislation or regulation that the agency proposes which provide for an award for attorney's fees in favor of only one class of parties, including those statutes which require the Government to pay a prevailing private party's attorney's fees. The agency shall recommend against enactment of the fee shifting provisions of such legislation if the costs significantly outweigh the benefits, or if the legislation does not define the fees and costs covered by the statute or detail when an award of fees and costs would be appropriate. Such agency recommendations shall be presented to OMB through the Circular A–19 legislative coordination and clearance process and included in the agency certification required under subsection (c) of this section.

Sec. 3. *Principles to Promote Just and Efficient Administrative Adjudications.* In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86–7 (1991).

Sec. 4. *Coordination by the Department of Justice.*

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1 and 3 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 3 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines which may be issued by other agencies pursuant to this order.

Sec. 5. *Definitions.* For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 6. *No Private Rights Created.* This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 7. *Scope.*

(a) *No Applicability to Criminal Matters or Proceedings in Foreign Courts.* This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) *Application of Notice Provision.* Notice pursuant to subsection (a) of section 1 is not required (i) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (ii) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (iii) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (iv) when the defendant is subject to flight; (v) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (vi) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) *Application of Alternative Dispute Resolution and Core Disclosure Provisions.* Subsections (c) and (d)(1) of section 1 of this order shall not apply (i) to any action to seize or forfeit assets subject to forfeiture, or (ii) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than $100,000.

(d) *Additional Guidance as to Scope.* The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 2, consistent with the purposes of this order.

Sec. 8. *Conflicts with Other Rules.* Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 9. *Privileged Information.* Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 10. *Effective Date.* This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

THE WHITE HOUSE,
October 23, 1991.

[FR Doc. 91-25898
Filed 10-23-91; 2:13 pm]
Billing code 3195-01-M

Editorial note: For the President's remarks on civil justice reform, see issue no. 43 of the *Weekly Compilation of Presidential Documents.*